

PAUL B. DUBOSE ET AL.

IBLA 94-4 Decided December 20, 1996

Appeal from a decision of the El Centro, California, Area Manager, Bureau of Land Management, denying a mining plan of operations for claims in a wilderness study area. CA 32466-CA 32468.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations—Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Plan of Operations

A finding by BLM that a proposed mining plan of operations for construction of a road and other mechanized surface disturbing activity on unpatented claims in a WSA would impair the area's suitability for inclusion in the wilderness system provided sufficient reason to deny approval of the plan.

APPEARANCES: Paul B. Dubose, Reno Nevada, and Paul Brent Dubose, Jr., Sparks, Nevada, pro sese.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Paul B. Dubose and Paul Brent Dubose, Jr. have appealed from an August 12, 1993, decision of the El Centro, California, Resource Area Manager, Bureau of Land Management (BLM), denying a mining plan of operations proposing road construction and other mechanized surface disturbing activity on unpatented mining claims CAMC 108060 through CAMC 11073 and CAMC 110136 through CAMC 110141 located in secs. 33 and 34, T. 14 S., R. 23 E., and secs. 33 and 34, T. 14½ S., R. 23 E., San Bernardino Meridian, Imperial County, California, within the Little Picacho Peak Wilderness Study Area (WSA) 356.

On May 24, 1992, appellants filed a plan of operations proposing to blade an existing road to reach their claims (referred to as the Hess Mine), where they proposed to use mechanized earth moving equipment to excavate for minerals. After an environmental assessment was prepared to consider whether the plan conformed to the nonimpairment criteria for WSA's, BLM denied approval in the decision here under review. Since the proposed activities were within the Little Picacho Peak WSA, appellants were informed that BLM was required to regulate mining operations on such

lands to prevent impairment of their suitability for inclusion in the wilderness system. Paraphrasing the definition of impairment found at 43 CFR 3802.0-5(d), BLM found that management of the area to prevent impairment was required until Congress decided whether it should become part of the wilderness system.

In statements of reasons filed separately, appellants argue that the area embracing their claims and access road should never have been included in a WSA. They contend that the area of their operations, which is within an area used to provide material that was taken for construction of a dam, includes the site of an old mine, since abandoned. Because of the prior industrial uses that permanently scarred this area, appellants argue, it was not suitable for inclusion within a WSA and should not now be treated as though it were.

[1] Section 603(a) of Federal Land Policy and Management Act of 1976, (FLPMA), 43 U.S.C. § 1782(a) (1994), directs the Secretary of the Interior to review roadless areas of 5,000 acres or more identified during inventory of the public lands as having wilderness characteristics and report to the President his recommendation as to the suitability of each such area for preservation as wilderness. While an area is under wilderness review and until Congress has rejected it for wilderness designation, BLM is required to manage that WSA under the nonimpairment mandate of section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1994). See Dave Paquin, 129 IBLA 76, 80 (1994), and authorities cited. Chapter IB.2. of the IMP, 44 FR 72018 (Dec. 12, 1979), provides guidance for application of nonimpairment criteria in management of WSA's: an activity is nonimpairing if, among other things, any impacts are capable of being reclaimed to a condition of being substantially unnoticeable by the time the Secretary is scheduled to send his recommendation to the President concerning the area's suitability for preservation as wilderness. See also 43 CFR 3802.0-5(d).

Appellants do not argue that the proposed access road and mechanized mining activities would not impair the wilderness suitability of the WSA, and we find that the record supports BLM's finding that these activities would violate the nonimpairment standard. Appellants have directed their arguments entirely towards identification of the area as a WSA and seek to find error in its continued management as a WSA because they contend that as a matter of fact it lacks wilderness qualities. Any question whether the Little Picacho Peak area had wilderness characteristics sufficient to be included in the study phase of wilderness review, however, was settled when BLM designated the area a WSA, and that designation is no longer subject to challenge; their contention is therefore untimely. See Dave Paquin, 129 IBLA at 80. The final decision whether WSA 356 will be included in the wilderness system rests with Congress, and the Department's duty to manage the lands consistent with the nonimpairment standard continues until Congress has acted. Id.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Amess
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

When reviewing the case file, I was reminded of the school newspaper Weekly Reader, a long time favorite of school-age children. Most will remember the drawing with the title "What's wrong with this picture?" I find a lot wrong with the picture presented by the DuBoise case file.

DuBoise's claims are located in a wilderness study area. He seeks access to his claims by way of the existing road to the old Hess mine workings. According to DuBoise, the Hess mine was active beginning about 1900, and in the 1960's large scale excavation took place in the area of the claims, using bulldozers and large trucks to provide rip rap for a nearby dam project.

In 1989 BLM advised DuBoise that he must file a plan of operations for any work he proposed to do on the claims, and that "the plan will be rejected and returned to you." True to its word, BLM rejected his plan of operations in 1989, 1990, and 1991. His 1993 plan was returned for a more detailed description of the proposed action and signature. It was resubmitted on June 17, 1993. DuBoise was advised by letter dated July 28, 1993, that "it is necessary that an Environmental Assessment be written for the plan of operations * * *. This preparation will result in a delay in answering the submitted plan."

An environmental assessment (EA) was issued on August 13, 1993. The proposed action was to blade the above-described main access road to the Hess mine using a D-8 or equivalent bulldozer, and to excavate the portal to the decline of the Hess mine with a backhoe to uncover mineralization. The EA notes that "the applicant has proposed to minimize unnecessary and undue degradation of the public land and to carry out reasonable reclamation by incorporating the following measures in his plan of operation:

1. No new roads would be constructed.
2. Vegetation would not be disturbed.
3. Material from the adit would be returned at completion of the testing phase.
4. Cyanide would not be used.
5. Testing of ore would be done off-site.

The only critical element to the human environment found to be impacted by the proposed action was the impact on wilderness values. I will quote the analysis of this impact in toto:

WILDERNESS: This action would take place wholly within an area designated as the Little Pichaco Peak Wilderness Study Area (WSA CDCA 356). Impacts to wilderness values would be as follows:

Size: Approximately 2-3 acres of the WSA would be impacted.

Naturalness: The proposed action would create new surface disturbance within previously disturbed areas. The proposal to use a backhoe to enlarge the adit of the Hess Mine to evaluate mineralization would further deteriorate the naturalness of the area. The impacts of the bulldozer and backhoe would be substantially noticeable while the work is in progress, and the cumulative effect to the new and existing impacts would create impacts that overall are noticeable.

Solitude: The noise of the machinery would negatively impact solitude while work is in progress.

Primitive Recreation: Opportunities for primitive recreation would be negatively impacted due to the operation of heavy equipment. This impact would be minimal if operations occur during the season of low recreation use (May through September), as proposed. Improving the road would also provide an access to the interior of the WSA which could impair opportunities for solitude and primitive recreation if the road results in increased motorized visitation.

Analysis Under Nonimpairment Standard:

Temporary Activity: The activity would be temporary, lasting approximately three months.

Temporary impacts: Impacts of the bulldozer and backhoe would be substantially noticeable while work is in progress. The deadline for reclaiming all surface impacts has passed. Any new impacts could therefore not be considered "temporary."

Constraints of the Secretary's Recommendation: The Secretary has already made his recommendations with respect to the area's suitability as wilderness. This action, which would create new surface disturbance would not be temporary or substantially unnoticeable, could constrain congressional designation authority.

(EA at 3).

The reason given to support the conclusion that the operation would impact the wilderness value was that "the proposed action does not conform with the nonimpairment policy as stated in the Interim Management Policy for Lands Under Wilderness Review. Impacts to wilderness values cannot be mitigated unless the proposed action is revised to preclude surface disturbing activity."

What is wrong with this picture?

The EA describes a portion of proposed work as being along "the main access road to the Hess mine." The photographs and descriptions in the case file support a finding that this road has existed for some time. If this is true, why is the road in a wilderness study area? What is the nature of this road? Is it a RS § 2477 road? What are the "wilderness characteristics" of the road that BLM seeks to preserve?

If the proposed equipment cannot be used to open the adit, are there absolutely no mitigating measures that could be proposed (or even examined) which might reduce the impact of the proposed work?

If absolutely no disturbance is to be tolerated, what measures are being taken to absolutely bar all members of the public from the area? If the standard is somewhat lower than an absolute bar of any disturbance, what disturbances would be tolerated? For example, if permission cannot be given to gather samples, should a camper be allowed to smooth a campsite or drive a tent peg? Some reasonable mitigating measures should be considered and proposed. We noted in Hoosier Environmental Council, 109 IBLA 160 (1989), that "it must be shown that, consistent with this Department's obligations under NEPA, the FERC EA provides an adequate basis both for an assessment of those impacts, as well as an informed consideration of stratagems to mitigate any adverse effects." Id. at 166 (emphasis added). It is necessary to look at mitigating measures when adopting a no action alternative. When examining a record on appeal this Board considers whether the record establishes that BLM

took a "hard look" at the environmental consequences of the proposed action, identified the relevant areas of environmental concern, made a reasonable finding that the impacts studied are insignificant and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impacts to insignificance. Cabinet Mountains Wilderness v. Peterson, 685 F.2d at 681-82; National Wildlife Federation, 128 IBLA 48 (1993); Powder River Basin Resource Council, 120 IBLA 47, 56 (1991); Tulkisarmute Native Community Council, 88 IBLA 210 (1985).

It is clear from the record of this decision that with respect to the potentially significant impacts, the record does not support a finding that BLM took a "hard look" at mitigating measures which might have reduced the potential impacts to insignificance.

The decision on appeal should be set aside and the case file remanded to BLM to allow BLM an opportunity to address the issue of a road existing when the wilderness study area was identified and conduct a meaningful EA upon which it might base its decision.

R. W. Mullen
Administrative Judge

